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ABSTRACT

This speech by the chairman of the Federal Communications Commission discusses some of the issues facing the broadcasting industry concerning the First Amendment such as guidelines for the percentage of adult informational programing, the Fairness Doctrine, government censorship, regulation of news programs, and access of the electorate to speeches on public issues. It includes views on how First Amendment considerations are being evaluated, especially in the area of programing for children. It also describes some of the issues related to reasonable access to broadcast time for political candidates. It indicates that the trend to hybrid communications services such as videotext requires the development of a framework for deciding future issues of broadcast regulation. (TJ)

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"Broadcasters and the First Amendment: No Stone Tablets"

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An Address By

Charles D. Ferris

Chairman, Federal Communications Commission

Before The

Federal Communications Bar Association

Capital Hilton Hotel

Washington, D. C.

Friday, November 30, 1979

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TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

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I am very pleased to join you. I do appreciate the timely opportunity to address the issue of most concern to all communications lawyers: The First Amendment and the electronic media.

Almost all communications policy issues are also First Amendment concerns -- concerns that are complex and evolving. They involve the rights of users of communications as well as fundamental issues of independent journalistic discretion.

Television, for example, is shaping, as no medium before, our values. It educates our children, and it educates us. It sets the national agenda -- civil rights, Vietnam, hunger, Watergate, and now the Iranian crisis. It makes us all direct participants in distant and unsettling events. Television is not a passive medium. Our immediate participation feeds back and affects the basic event with an impact of incredible dimension. It truly determines the way we live and behave as individuals and as a nation.

We are all therefore involved in more than the business of communications. We are involved in the shaping of the values of society.

But besides the joy of working on something truly meaningful, we in this small and well-mirrored community are also blessed with an agenda of issues that is in constant growth and change.

We are entering an uncharted information age where old lines between traditional broadcast and common carrier services are gone. "Newspapers" may soon be delivered between the lines of TV signals, or over telephone lines. What free speech rights attach to them? Should

their rules parallel those of common carriers with rights of access and entry, but without content review; or of broadcasters, with fairness obligations; or should they be governed by the absence of regulation, like print? During the period of transition, in establishing a new policy framework for future industry patterns, we must face directly the First Amendment implications of the policy decisions we make for existing media.

There is much cacophony in this important dialogue on First Amendment values. Hardly a day passes without an industry information organ grinding out complaints that the FCC is standing the First Amendment on its head. Yet I am not always certain that all of the industry guardians of the First Amendment are sure which end of the First Amendment is up on all issues.

For example, about a year ago the FCC designated for hearing the license of a radio station whose programming was below our six percent percentage processing guideline for news and informational programming. At that time some industry spokespeople complained that the radio processing guidelines were an unconstitutional infringement on broadcasters' discretion.

But now that the FCC has proposed, in its radio deregulation order, to do away with those very guidelines, there apparently has been much industry consternation. The absence of specific radio program guidelines, it now seems, may create unwarranted uncertainty and instability for broadcasters.

Already some in the industry have made clear that they support percentage guidelines for "adult" informational programming as posing no First Amendment problem in the television comparative renewal area, so long as the quid pro quo is certainty at renewal time. But at the same time we are told that such guidelines for children's informational programming pose a grave threat to First Amendment interests, apparently since there is a quid pro quo only for the audience -- some certainty of balanced service for younger viewers.

My point is not simply to note the expedient basis upon which First Amendment principles often appear to be expressed. Instead it is to stress how difficult and delicate it is to appraise the First Amendment implications of any particular regulatory proposal -- for viewers and listeners, and for broadcasters. First Amendment issues do not come to us in cartons marked "This side up."

In dealing with electronic media regulation, there are often no unambiguous policy directions dictated by the First Amendment. Unfortunately, we have not been given a tablet of stone engraved with "thou shalt's" and "thou shalt nots." Instead, the FCC has been told by the Supreme Court that it must accommodate and weigh competing First Amendment considerations and intricately strike different balances on different issues.

I have made no secret of my own views on how we should approach this task.

First, I have consistently opposed any form of prior restraint restricting controversial broadcast speech. Instead, I have tried to stress the affirmative obligations of the first part of the Fairness Doctrine requiring broadcasters to air such speech.

After the Supreme Court's Pacifica decision over a year ago -- the so-called "seven dirty words" decision -- I publicly stated that I did not intend to let that decision open the flood gates to the forces of censorship. I believe I have kept that promise, despite the thousands of letters we have since received asking that network entertainment programs be censored by the FCC. The temptation is great to feed the public's hunger for government efforts to "clean up television;" but we have resisted that pressure.

We are also asked to second-guess the networks' judgments on their nightly news -- on Israel, the PLO, Iran and energy. But I think that the networks news departments do a tough and often courageous job, and we should not be trying to see that they make everyone happy.

Secondly, I believe that the Supreme Court was right in its 1969 Red Lion decision when it said the FCC does have a positive role under the First Amendment in insuring a well informed electorate by fostering more access to speech on public issues. The Fairness Doctrine is the most well-known example. Even Justice Brennan in his Pacifica dissent observed this distinction, stating that the FCC did have such a proper role in a medium of limited access.

My preference -- as often stated -- is for achieving this First Amendment goal of more robust debate by structural means where possible. To this end I have strongly supported FCC minority ownership incentives, stronger EEO enforcement to insure decisional participation of women and minorities, strict enforcement of our multiple and cross-ownership rules, strong federal support of public broadcasting, and new technologies that

can offer far more pathways to the home for the journalist and creative artist.

Where these structural means of fostering diverse sources of information and entertainment appear to be working well, as in radio, I believe the FCC should reexamine whether it needs to continue to play as strong a regulatory role in the marketplace of ideas. For I do not think the government should linger in any field of electronic communications a day longer than absolutely necessary to insure adequate protection of the public's interest in diverse speech.

With this background, let me share my views on how I believe First Amendment values are being carefully and thoughtfully evaluated in some areas of immediate concern to us at the FCC -- and I think of immediate interest to most of you as well.

Let me turn first to our inquiry into programming for children. As most of you know, in 1974 the FCC found that among the essential affirmative obligations of broadcasters was increased program service to meet the educational and instructional needs of children -- both preschool and school age -- in programs spread throughout the broadcast week. The FCC found this obligation to be fully consistent with the First Amendment. Broadcasters did not appeal this finding.

The FCC's Children's Task Force Study recently found that, while broadcaster efforts to provide informational programming for children on Saturdays has shown improvement, no similar level of effort has been made on weekdays, as envisioned by the FCC's 1974 Policy Statement and as

voluntarily promised by the industry. But faced with the possiblity of performance rather than promise, the broadcast industry prefers to deal now with abstract First Amendment slogans rather than with the virtual absence of weekday programs on commercial television designed specifically to meet children's specialized viewing needs.

But the legal and the factual issues cannot be separated. In 1974 there was one daily network preschool program regularly scheduled on weekdays -- CBS's Captain Kangaroo. In 1979 there was still one such program -- same network, same show. Yet preschool children watch an average of 33 1/2 hours of programming per week, and only 8 percent of this viewing is on Saturday morning.

I do not dispute that the FCC will have to wrestle with difficult constitutional issues as it debates possible mandatory program guildeines. But because a proposed remedy affects constitutionally protected interests does not make it unconstitutional on its face. If past court decisions tell us anything, it is that these issues cannot be dealt with in the abstract outside a specific factual record, in which the Commission must carefully balance competing considerations.

For example, we must consider the degree to which compelling interests of all viewers are affected by a quantitative directive for children. Very young children, in particular, do not even have the alternative sources of information that are available to adults or even to older children, because they cannot read. And we do already have

minimum processing guidelines for adult informational programming.

At the same time we must examine carefully whether there are alternative means within the existing commercial system to assure diverse informational programming for children. But we cannot pursue affirmative action employment or ownership programs for children, as we do for minorities and women to insure their input into programming decisions.

My point here is simply that in dealing with constitutionally sensitive areas, important factual issues must be addressed. There are no rigid litmus tests to assess the constitutionality of any rule requiring an increase in informational programming for the child audience.

In light of the controversy stirred over the possibility of a mandatory children's programming rule or processing guideline, I have reflected recently on the likely reaction if the FCC begins to focus primarily on other options for dealing with children's programming needs. We could decide after rulemaking against the quantitative guideline approach, even though we conclude that without such standards broadcast television will not offer sufficient weekday programming fully responsive to children's needs. Instead, we could seek to spur new technologies -- cable or videodiscs or direct satellite to home broadcasting systems -- that might serve such needs.

We might even adopt what could be called an "anti-Carroll doctrine." Such a policy statement would state that because of the inherent limitations of advertiser-supported broadcast television in meeting the child viewer's diverse educational and informational needs, new technologies should be

affirmatively promoted. In considering whether to authorize entry by direct broadcast satellite or in weighing the economic impact of cable on broadcasting, the potential benefit to children would be a factor weighed by the FCC to resolve close cases of potential adverse impact in favor of new entry and new services.

I can only speculate what broadcasters' response will be if this alternative becomes our favored option. But broadcasters seem to oppose any FCC decision to open new services to the public as adamantly as they oppose programming obligations imposed on themselves because of the resulting lack of competition. And that, of course, is the rub.

Broadcasters shun the consequences of scarcity -- and the public trustee obligations imposed on them by scarcity. But at the same time they vigorously oppose any change in the status quo and seek to preserve that scarcity even when a change would provide a justification for removal of governmentally imposed obligations.

The time is coming when broadcasters will have to face some difficult choices, if they truly wish to shift the First Amendment balancing process towards ever greater independence and autonomy for electronic media. I don't think that broadcasters can keep demanding constitutional parity with the print media and -- at the same time -- also oppose, as a matter of principle, competition and diversity in the electronic media on an equivalent level to that in print today, with its abundance of local, regional and national magazines, newsletters, and newspapers.

The children's television proceeding poses this First Amendment dilemma very sharply. How your clients respond may set the tone for this debate for years to come.

Let me turn now to the same constitutional principles as they apply to the political broadcasting area. As you all know, the FCC recently found that the three major networks acted unreasonably in refusing a request by the Carter-Mondale Campaign Committee to purchase a half-hour of network time on one of the networks. This matter is now in litigation, but I believe I can express my general views as to the difficult First Amendment weighing process in applying Section 312(a)(7).

That section of the Communications Act establishes an obligation to afford federal candidates "reasonable access" or "to permit the sale of reasonable amounts of time" on broadcast stations. Its legislative history provides little guidance for interpreting what "reasonable access" requires. But over the years the Commission has recognized that a number of factors must be balanced.

Congress did not intend to remove entirely broadcasters' discretion or to translate broadcasting into a complete common carrier for candidates. But Congress did clearly intend to enlarge broadcasters' obligations to provide candidates access and to assure adequate consideration of candidate's needs. And whatever the rights of broadcasters and candidates, Congress was at least explicit in stating that the purpose of Section 312(a)(7) was to assure an informed electorate.

How, then, can these three interests -- of candidates, broadcasters and the public -- be accommodated by the FCC? Waht leeway should we accord to broadcaster judgment?

Can the reasonable access obligation be made to work? I think it can only if the FCC demonstrates restraint, and if broadcasters and candidates enter into the process envisioned by the statute with cooperation and good faith. Some basic issues about Section 312(a)(7) may well be finally resolved by the courts. Meanwhile, a major election campaign is underway; and it is, I believe, essential for some overall approach to "reasonable access" issues to be worked out by the networks, broadcasters, and all the candidates and their representatives. This is the surest way to avoid FCC intrusion during the course of the campaign.

In the long run I prefer a course of action that would deal with issues of media dominance and media scarcity, not through access requirements or programming controls, but by encouraging new outlets and new services. In this way the FCC can begin establishing the factual predicate upon which electronic and print media may eventually be deemed to have full parity under the First Amendment.

Again, the real irony to me is that those who most strongly oppose regulations of any kind -- even the basic electorate informing provisions of Sections 315 and 312(a)(7) -- that arise from scarcity and limited diversity -- also oppose the types of regulatory actions that might diminish or eliminate the need for such regulation.

I would be far more confident about moving in the direction of both longer term or indefinite licensing in radio and comparative renewal reform in television if basic guarantees of a competitive and diverse market were in place.

As part of comprehensive broadcast regulatory reform, there should also be a clear government policy of no longer discouraging the emergence of competitive media. Expansion of public broadcasting should be affirmatively encouraged.

If these and other government policies are pursued, we will be moving toward a different basic approach to electronic media regulation.

At the same time these basic trends are emerging in traditional broadcast services, there are new hybrid services -- like videotext -- that combine broadcast and common carrier services of the past. If we can begin to reach the right results now, we will build the framework so that we can insure that these and other new services are provided with the chance to develop not on the broadcast model -- but on the print model of unlimited speech rights, free of any government obligations or restraints.

It is an exciting time in communications and we all are fortunate in being given the opportunity to participate in shaping the First Amendment communications model of the future.